

Reference is made to the CNA reservation of rights letter, dated February 25, 2005, (the "reservation"), relating to its obligations to Blackwater in the North Carolina Nordan litigation. The reservation serves to deny coverage and defense to Blackwater for Justin McQuown and Thomas Powell, individuals and Blackwater employees named as defendants in the litigation, and serves to place Blackwater on notice that while CNA will presently continue to provide defense to the Blackwater corporate defendants its on-going "investigation" has raised "serious concerns" as to whether Blackwater's CNA policy "provides coverage for defense or indemnity" of the Nordan litigation. In so reserving its rights CNA advises of the potential for it to terminate its defense, deny a settlement or judgment, and claim for all attorneys fees, costs and expenses advanced.

The reservation is ill-timed, premature, faulty in its legal and logical analysis, at odds with its declared position in the DBA claims and significantly prejudicial to Blackwater in the defense of the Nordan litigation. It claims justification by isolating its coverage analysis to a stilted reading of the Employers' Liability policy and that coverage form's various provisions relating to the definition of a covered "employee" as opposed to a non-covered "independent contractor". Since Blackwater termed the four deceased as independent contractors, and within their employment contracts made the obtaining of workers compensation insurance the obligation of the decedents, and since the Nordan complaint alleges the four to be independent contractors, CNA asserts that there is no cover for the lawsuit under the Employers' Liability form. It attempts to ignore the consequences of its acceptance of the decedents as "employees" in the DBA claims by simply stating that as the lawsuit is not for compensation benefits the Workers Compensation policy "is not applicable to this matter".

The coverage issue in the DBA claims and the Nordan litigation, i.e., "independent contractor" status, is identical in both forums. CNA has consistently and without exception accepted the deceaseds as "employees" in the DBA claims, has paid DBA benefits, and in writings and to the US Department of Labor, committed itself to that identification status. Blackwater's defense to the Nordan suit rests to a critical degree on the deceaseds' legal status as DBA "employees" and the DBA's exclusivity provision. Despite CNA's attempt to alter this status by arguing that Blackwater passed the obligation to provide worker's compensation cover to the deceaseds because of certain language in the employment agreements, in fact, Blackwater did provide such cover by virtue of the DBA policy. CNA has paid on this policy, thereby voiding its own argument of Blackwater's asserted failure to provide such cover. Thus, the reservation of rights letter is ineffective as to CAN but will be extremely prejudicial to BW.

The reservation would become evidence in the Nordan litigation, supportive of plaintiffs' position of "independent contractor" status, thereby denying the DBA exclusivity defense. CNA's decision to send the reservation at this time serves no necessary purpose and has the potential to critically harm Blackwater's defense.

Please retract the letter.

— from Stock CAPX —

ALL STATE LEGAL

**EXHIBIT 3**

**SUMMARY OF DBA INSURANCE BENEFITS**

Insurance Company: Fidelity and Casualty of NY (part of the CNA Insurance Company).

Contact Information: Ms. Donna Sprags  
Casualty Claims Manager  
Global  
CNA Plaza 32S  
Chicago, IL 60685  
Work: 312-822-1925  
Mobile: 773-203-5527  
Home: 773-375-5570  
e-mail: [donna.sprags@cna.com](mailto:donna.sprags@cna.com)

DBA benefits are based on the The Defense Base Act, a federal Statute that makes DBA coverage mandatory for individuals engaged in the type of work that now has you overseas. The benefits are set forth by Federal Statute. In other words, neither Blackwater nor the Insurance Company can alter or change DBA benefits that you are entitled to pursuant to the Federal Statute created by Congress.

Blackwater buys a "DBA policy" from a qualified insurance company who agrees to cover all of BW's employees or contractors deployed overseas in connection with a certain program.

The Defense Base Act provides long and short term disability, medical and death benefits to covered employees injured or killed in the course of employment whether or not the injury occurred during work hours.

All claims are administered by the Deputy commissioner of the US Government's Dept of Labor. The insured contractor must file any claims within 10 days of injury with their insurance company. BW will file claims on behalf of contractors. The insurance carrier has the responsibility of filing all claims with the Dept of Labor and notating all progress that develops on the claim. The Deputy Commissioner ensures that injured employees or contractors are treated fairly and by the guidelines under DBA. The Dept of Labor monitors every DBA claim that is filed and is notified when claims have been "closed" as well.

**Injury Benefits:** If you are injured, you are entitled to lost wages in the amount of 66.67% of your average salary with the maximum benefit being \$1,030.78 per week. This is in addition to any medical or repatriation expenses. You are entitled to medical treatment from a physician of your choice as the injury may require. An employee receives compensation for "loss of wages" for as long as the treating doctor deems the employee "unable to perform their occupational" duties. Once a "return to work" notice is issued by the doctor, the loss of wage payments will cease. Medical benefits are

unlimited until the care is no longer required. Medical benefits apply both CONUS and OCONUS. Whether you are "permanently disabled" will be determined on a case-by-case basis pursuant to established DOL standards.

**Death Benefits:** Death benefits are paid to a surviving spouse and/or minor children (to age 18 (or 22 if a full time student)) in the amount of one-half (50%) your average weekly earnings to the dependent surviving spouse and two thirds (66.67%) earnings for two or more dependent survivors up to a maximum of \$1,030.78 per week (2004 maximum). Dependent children from a former marriage are entitled to benefits as long as they have not been subsequently adopted by another individual. Dependent Stepchildren would be entitled to benefits under DBA as long as they are not a dependent of another person. "Dependency" will be evaluated by Department of Labor standards. Whether a former (i.e., divorced) spouse is considered a dependent under Department of Labor standards depends upon, among other things, the terms of the divorce decree.

Average weekly earnings are calculated based on the average income for past twelve (12) months prior to death. Death benefits are payable to a surviving spouse for life and are subject to upward cost of living adjustments each year. Typically, the loss of wage amount is paid weekly or bi-weekly for at least 1 year prior to the insurance carrier considering a "structured or lump sum" settlement.

CNA will coordinate and provide all repatriation services to a location of the choice of the family. This service will be provided at no cost to you. The insurance company will also provide up to \$3,000 for funeral expenses.

Payments will be made as soon as possible but generally w/in 14 – 30 days from notification date. Repatriation and funeral costs will be disbursed immediately.

of this DBA primer.

US Department of Labor  
Office of Workers' Compensation Programs  
200 Constitution Avenue NW, C-4315  
Washington, DC 20210

## DEFENSE BASE ACT

### WORKERS' COMPENSATION FOR EMPLOYEES OF U.S. GOVERNMENT CONTRACTORS WORKING OVERSEAS

Federal law requires all U.S. government contractors and subcontractors to secure workers' compensation insurance for their employees working overseas. The related statutes include the Defense Base Act, 42 U.S.C. §§ 1651-54 and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50. Implementing regulations can be found at 20 C.F.R. Parts 701, 702, 703 and 704. The Federal Acquisition Regulation (FAR) also sets out the workers' compensation insurance requirements for all overseas contracts at 48 C.F.R. § 28.305 and at § 52-228-3 and § 52-228-4.

The U.S. Department of Labor, Office of Workers' Compensation Programs (OWCP), Division of Longshore and Harbor Workers' Compensation, administers the Defense Base Act, ensuring that workers' compensation benefits are provided for covered employees promptly and correctly.

#### Coverage under the Defense Base Act

The Defense Base Act covers the following employment activities:

- Working for private employers on U.S. military bases or on any lands used by the U.S. for military purposes outside of the United States, including those in U.S. Territories and possessions;
- Working on public work contracts with any U.S. government agency, including construction and service contracts in connection with national defense or with war activities outside the United States;
- Working on contracts approved and funded by the U.S. under the Foreign Assistance Act, generally providing for cash sale of military equipment, materials, and services to its allies, if the contract is performed outside of the United States;
- Working for American employers providing welfare or similar services outside of the United States for the benefit of the Armed Forces, e.g. the USO.

If any one of the above criteria is met, all employees engaged in such employment, regardless of nationality, are covered under the Act.

### Insurance Requirements

Sections 1(a)(4) and (5) of the Defense Base Act, 42 U.S.C. §§ 1651(a)(4) – (5), provide that every contract coming within the purview of the Act:

“shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such Public work under such contract the payment of compensation and other benefits under the provisions of this Act, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, ...”

The Defense Base Act (DBA) adopts the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) with but a few exceptions. The insurance requirements for the DBA are identical to those found in the LHWCA.

Section 32(a) of the Longshore Act requires every employer either to secure insurance for the payment of workers' compensation benefits provided under the Act or to be permissibly self-insured. The OWCP is responsible for the authorization of insurance carriers and self-insurance of employers. For a list of the over 700 insurance carriers and self-insured employers currently authorized, see <http://www.dol.gov/csa/owcp/dlhwc/lscarricr.htm>. Three major insurance carriers are currently providing Defense Base Act insurance coverage. They are ACE-USA, AIG, and CNA.

Section 4(a) of the Act requires every employer to be liable for, and to secure the payment of, disability, medical, and death benefits to its employees in the event of injury or death. If a subcontractor fails to secure the payment of compensation, the contractor will be liable for and be required to secure the payment of such benefits.

Section 5(a) of the Act provides that “a contractor shall be deemed the employer of a subcontractor's employees ... if the subcontractor fails to secure the payment of compensation....”

Section 5(a) also provides that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his survivors in case death results from the injury, may elect to sue the employer for tort damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Section 38(a) provides that an employer who fails to secure the payment of compensation when required shall be guilty of a misdemeanor and, upon conviction thereof, shall be

punished by a fine of not more than \$11,000 or by imprisonment for not more than one year, or both. And if the employer is a corporation, the president, secretary, and treasurer shall be also severally liable for such fine and imprisonment.

Furthermore, if a corporation fails to secure the payment of compensation, the president, secretary, and treasurer shall be severally and personally liable, jointly with the corporation, for any compensation or other benefits payable under the Act in respect to any injury or death which may occur to any of its employees.

### **Defense Base Act Waivers**

Upon the written request of the head of any department or other agency of the United States, the Secretary of Labor may waive the application of the Defense Base Act with respect to any contract, work location, or class of employees. The request for waiver must be made by the government agency to the Department of Labor (DOL), OWCP. It is Department of Labor policy that the waiver does not apply to citizens or legal residents of the U.S. or to employees hired in the U.S. Once granted, the waiver is only valid if alternative workers' compensation benefits are provided to the waived employees pursuant to applicable local law.

### **Benefits under the Defense Base Act**

The Defense Base Act provides disability, medical, and death benefits to covered employees injured or killed in the course of employment, whether or not the injury or death occurred during work hours. Compensation for total disability is two-thirds of the employee's average weekly earnings, up to a current maximum of \$1,030.78 per week. Compensation also is payable for partial loss of earnings. Death benefits are half of the employee's average weekly earnings to the surviving spouse or to one child, and two-thirds of earnings for two or more such survivors, up to the current maximum weekly rate. Permanent total disability and death benefits may be payable for life, and are subject to annual cost of living adjustments. There is no minimum compensation rate.

Permanent disability and death benefits payable to aliens and non-U.S. residents may be commuted by payment of half of the present value of future compensation, as determined by the OWCP district director.

The injured employee is entitled to medical treatment by a physician of his/her choice, as the injury may require. Medical benefits may not be commuted.



### **Procedures for Reporting Injuries and Filing Claims**

Two OWCP district offices have primary responsibility for injuries arising under the Defense Base Act: the New York district office and the Honolulu district office. For jurisdictional boundaries, see <http://www.dol.gov/esa/contacts/owcp/nv/distof-1.htm>. For district office addresses, see <http://www.dol.gov/esa/owcp/dlhwc/lscntac.htm>.

The employer should notify its insurance carrier, or if it is self-insured the claims administrator, as soon as it has knowledge of an injury. Medical treatment if needed should be authorized immediately. An Employer's First Report of Injury, Form LS-202, must be filed with the OWCP district office having jurisdiction within 10 days of the injury, if it causes loss of one or more work shifts. The Form LS-202 may be filed electronically. For information and instructions, go to <http://www.dol.gov/esa/owcp/dlhwc/liforms.htm>

Additional forms and notices, as well as medical reports, should be filed with the OWCP as regulations require.

A written claim for benefits must be filed in the office of the OWCP district director within one year of the injury or within one year from the last payment of compensation, whichever is later.

The OWCP district office monitors the payment of compensation and medical care to ensure compliance with the provisions of the Act. Its staff provides technical assistance to employers, insurance carriers, and benefit claimants for the prompt delivery of benefits. In case of claims disputes, OWCP claims examiners conduct informal conferences to help the parties resolve their disputes by way of mutual agreement or compromise without formal litigation. The district director has authority to approve settlements and issue compensation awards in undisputed claims.

If the parties are unable to resolve their disputes informally, they may request the referral of the claim to the Office of Administrative Law Judges for formal hearing. Decisions of the administrative law judge are appealable to the Benefits Review Board, and thereafter to the U.S. District Court or to the U.S. Court of Appeals.

### **Defense Base Act Seminars and Workshops**

The OWCP National Office and district offices hold periodic seminars and workshops for industry groups as the need arises, or upon request. For information on upcoming events, check the official Longshore website at <http://www.dol.gov/esa/owcp/dlhwc/lstable.htm>.

**Resources and Useful Links**

OWCP/Longshore Website <http://www.dol.gov/esa/owcp/dlhwc/lstable.htm>

OWCP/Longshore Contacts <http://www.dol.gov/esa/owcp/dlhwc/lcontac.htm>

District Offices with DBA jurisdiction  
<http://www.dol.gov/esa/contacts/owcp/nv/distof-1.htm>

Copy of the Defense Base Act  
<http://www.dol.gov/esa/owcp/dlhwc/dba.htm>

Copy of the Longshore Act <http://www.dol.gov/esa/regs/compliance/owcp/lhwca.htm>

Copy of the Longshore Regulations at 20 C.F.R. Parts 701 to 704.  
[http://www.dol.gov/dol/allcfr/Title\\_20/Chapter\\_VI.htm](http://www.dol.gov/dol/allcfr/Title_20/Chapter_VI.htm)

Copy of the Longshore Procedure Manual  
<http://www.dol.gov/esa/owcp/dlhwc/lspm/pmtoc.htm>

Longshore Forms <http://www.dol.gov/esa/owcp/dlhwc/lforms.htm>

List of Authorized Longshore Insurance Carriers and Self-Insured Employers  
<http://www.dol.gov/esa/owcp/dlhwc/lscarrier.htm>

Maximum Compensation Rate and Annual Adjustment Table  
<http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm>